Chee Kok Choon v Sern Kuang Eng

HIGH COURT (KUALA LUMPUR) — DIVORCE PETITION NO S8(S4)–33–562 OF 2001
FAIZA THAMBY CHIK J
28 OCTOBER 2004

Family Law — Children — Custodianship — Factors to be considered — Jurisdiction of court

Family Law — Children — Maintenance — Power of court to direct providence for maintenance of children

Family Law — Divorce — Division of assets — Whether to be distributed equally — Maintenance — Whether respondent's contributed to petitioner's acquisition of assets after their separation — Law Reform (Marriage and Divorce) Act 1976 s 76 (2) & (4)

Family Law — Irretrievable breakdown of marriage — Living in separate bedrooms and apart for more than seven years — Whether petitioner proved that marriage had irretrievably broken down — Law Reform (Marriage and Divorce) Act 1976 s 54(1)(d)

Family Law — Matrimonial property — Division of property — House purchased by husband — Wife made a direct contribution by drawing from her EPF balance — Whether wife entitled to share in matrimonial house — Law Reform (Marriage and Divorce) Act 1976 s 76 (1) & (3)

The parties were married in 1990. There was one child in the marriage. The parties have been living in separate bedrooms since early 1997. In June 1997, the petitioner left the matrimonial home. He said he left the matrimonial home as the relationship of the parties had deteriorated, and there was no longer any communication between them. At the time of the marriage, the petitioner was 34 years of age, while the respondent was only 26. This was a divorce petition filed by the petitioner. The respondent filed for an order for guardianship, custody care and control and maintenance as well as a declaration of her entitlement to matrimonial properties. The petitioner had been paying a monthly sum of RM3,200 as maintenance for the respondent and the child. The respondent also continued to reside in the matrimonial home. The respondent claimed that she had contributed in terms of time and effort during the marriage, to help the petitioner's business and to acquire assets. The respondent also said that she made some payments for the matrimonial home. The matrimonial home was in joint names. The petitioner also provided the respondent with a Mercedes car.

Held:

(1) Section 76(4) of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') stated that the party by whose effort the assets were acquired shall receive a greater proportion. Equality of division was therefore not the

only purpose and purport of s 76 of the Act. Equality was provided in s 76(2). Where s 76(4) applies, the division cannot be equal. In this case, only a very small part of the assets were acquired before the respondent stopped working (see para 9).

(2) English precedents would only apply to the interpretation of our sections (in Part VI of our Act) which were in *pari materia* with English provisions. English principles cannot apply where our legislation has no English equivalent. Seen in this light, it was apparent that recent developments in English judge-made law as to the rights of a spouse in division of matrimonial assets cannot be followed here (see para 26).

(3) The respondent's needs were well taken care of. She continued to live comfortably in the matrimonial home. The only child of the marriage is almost 13 years of age. There was no reason why she cannot go out to work. As the respondent did not have a 'family' in the strict sense to look after (since there was no husband as the petitioner had left the matrimonial home) and only a 13 year old girl (who presumably like all other children her age spent most of her time in school and at extra-curricular activities), the respondent can be expected to improve herself and her employment prospects, and to be gainfully employed. The marriage should therefore be dissolved on the petitioner's allegation of living apart alone under s 54(1)(d) of the Act (see para 31).

(4) There was also therefore no reason for the court not to grant the dissolution of the marriage on the petition of the petitioner, since the respondent conceded that the marriage had irretrievably broken down. That fact was not disputed, and the respondent's religious belief was not a ground to refuse to grant the decree. It had not been pleaded, and no evidence had been led, on behalf of the respondent, as to why it was not just and reasonable to grant the decree. No suggestion had been made as to how the interest of the child may be affected or why it would be wrong to dissolve the marriage. In the circumstances, the order of decree nisi was granted (see para 46).

(5) Section 76 of the Act introduced a regime of matrimonial assets and principles for division. The power of the court to order division is two fold — to divide assets acquired jointly (s 76(1)) and assets acquired by the effort of one party (s 76(3)). In this case, only in the case of the matrimonial home could the respondent's claim be taken seriously, as she claimed to have made a direct contribution by also drawing from her EPF balance, just as the petitioner did. The fact that the petitioner had paid the mortgage instalments for all these years was also a material factor. The parties had been living in separate bedrooms since early 1997 and apart since June 1997 (ie for seven years). The respondent could not have contributed to the petitioner's acquisition of assets after their separation (see paras 34 and 35).

(6) Legal custody of the child was granted to the petitioner and respondent jointly. The petitioner was also to maintain the child in the monthly sum of RM1,200 plus paying actual expenses for normal education, medical and dental (see para 47).

(7) The petitioner was also ordered to transfer his half share in the matrimonial home and another property to the respondent absolutely. In respect of all the fixed deposits, the petitioner shall give the respondent a sum of RM50,000 in full settlement of all sums still available in those fixed deposits. The respondent shall transfer her 15% shares in the petitioner's business to the petitioner absolutely and thereafter she shall have no further claim on them. The petitioner was ordered to transfer the Mercedes car to the respondent absolutely (see para 47).

[**Bahasa Malaysia summary**

Kedua belah pihak telah berkahwin pada tahun 1990. Mereka mendapat seorang anak hasil perkahwinan itu. Pihak-pihak tersebut telah menetap dalam bilik tidur berasingan sejak awal tahun 1997. Pada bulan Jun 1997, pempetisyen telah meninggalkan rumah perkahwinan mereka. Beliau berkata beliau telah meninggalkan rumah perkahwinan itu kerana hubungan antara kedua belah pihak tidak rapat, dan tiada apa-apa komunikasi antara mereka. Pada masa perkahwinan itu, pempetisyen berumur 34, sementara responden hanya berumur 26 tahun. Ini adalah petisyen perceraian yang difailkan oleh pempetisyen. Responden telah membuat pemfailan untuk satu perintah hak penjagaan kanak-kanak, kawalan dan nafkah juga satu deklarasi terhadap haknya ke atas harta perkahwinan. Pempetisyen telah membayar jumlah bulanan sebanyak RM3,200 sebagai nafkah untuk responden dan anak tersebut. Responden juga terus menetap di rumah perkahwinan itu. Responden mendakwa bahawa beliau telah menyumbang dari segi masa dan tenaga semasa perkahwinan itu, untuk membantu perniagaan pempetisyen dan untuk memperoleh aset. Responden juga mengatakan bahawa beliau telah membuat beberapa pembayaran untuk rumah perkahwinan itu. Rumah perkahwinan itu adalah atas nama bersama. Pempetisyen juga telah memberikan responden sebuah kereta Mercedes.

Diputuskan:

(1) Seksyen 76(4) Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta tersebut') menyatakan bahawa pihak yang berusaha untuk mendapatkan aset hendaklah menerima bahagian yang lebih. Kesaksamaan pembahagian bukanlah satu-satunya tujuan dan maksud s 76 Akta tersebut. Kesaksamaan diperuntukkan dalam s 76(2). Di mana s 76(4) terpakai, pembahagian itu tidak boleh sama rata. Dalam kes ini, hanya sebahagian kecil aset yang diperoleh sebelum responden berhenti bekerja (lihat perenggan 9).

(2) Autoriti Inggeris hanya akan terpakai kepada tafsiran seksyen–seksyen kita (dalam Bahagian VI Akta tersebut) yang *pari materia* dengan peruntukan-peruntukan Inggeris. Prinsip-prinsip Inggeris tidak boleh terpakai di mana perundangan kita tidak mempunyai yang sama dalam perundangan Inggeris. Dari sini, adalah jelas bahawa perkembangan terkini dalam undang-undang yang dibuat oleh hakim Inggeris berhubung hak pasangan dalam pembahagian aset perkahwinan tidak boleh diikuti di sini (lihat perenggan 26).

(3) Keperluan responden dijaga dengan baik. Beliau terus menetap dengan selesa di rumah perkahwinan itu. Satu-satunya anak hasil perkahwinan itu berumur hampir 13 tahun. Tiada alasan kenapa beliau tidak boleh bekerja. Oleh kerana responden tidak mempunyai sebuah 'keluarga' dalam erti kata sebenar untuk dijaga (memandangkan tiada suami kerana pempetisyen telah meninggalkan rumah perkahwinan) dan hanya kanak-kanak perempuan berumur 13 tahun (yang seperti kebanyakan budak seusia dengannya meluangkan masanya di sekolah dan aktiviti kurikulum tambahan), responden dapat memperbaiki dirinya dan prospek pekerjaan beliau, dan diambil bekerja semula. Perkahwinan itu hendaklah oleh demikian dibatalkan berdasarkan pengataan pempetisyen berhubung hidup sendiri secara berasingan di bawah s 54(1)(d) Akta tersebut (lihat perenggan 31).

(4) Tiada alasan untuk mahkamah untuk tidak membenarkan pembubaran perkahwinan berdasarkan petisyen pempetisyen itu, memandangkan responden bersetuju yang perkahwinan itu telah musnah. Fakta itu tidak dipertikaikan, dan kepercayaan agama responden bukan satu alasan untuk tidak memberikan dikri. Ia tidak diplidkan, dan tiada keterangan dikemukakan, bagi pihak responden, kenapa ia tidak adil dan munasabah untuk memberikan dikri. Tiada cadangan dibuat tentang bagaimana kepentingan anak tersebut akan terjejas atau kenapa ia salah untuk membubarkan perkahwinan itu. Dalam keadaan sedemikian, perintah untuk dikir nisi dibenarkan (lihat perenggan 46).

(5) Seksyen 76 Akta tersebut memperkenalkan satu regim aset perkahwinan dan prinsip-prinsip untuk pembahagian. Kuasa mahkamah untuk memerintahkan pembahagian terbahagi kepada dua — untuk membahagikan aset-aset yang diperoleh bersama (s 76(1)) dan aset-aset yang diperoleh oleh usaha satu pihak (s 76(3)). Dalam kes ini, hanya dalam kes rumah perkahwinan tuntutan responden boleh diambil secara serius, kerana beliau mendakwa telah menyumbang secara langsung dengan mengeluarkan baki daripada KWSP beliau, seperti mana yang pempetisyen telah lakukan. Fakta bahawa pempetisyen telah membayar ansuran gadaian selama ini juga merupakan faktor material. Kedua belah pihak telah hidup berasingan sejak awal tahun 1997 dan berjauhan sejak bulan Jun 1997 (iaitu selama tujuh tahun). Responden tidak mungkin telah menyumbangkan kepada

perolehan aset-aset pempetisyen selepas perpisahan mereka (lihat perenggan 34 dan 35).

(6) Hak penjagaan sah anak itu diberikan kepada pempetisyen dan responden bersama. Pempetisyen juga perlu mengekalkan jumlah bulanan RM1,200 dan juga perbelanjaan sebenar untuk pendidikan biasa, perubatan dan pergigian (lihat perenggan 47).

(7) Pempetisyen juga diperintahkan memindahkan separuh daripada bahagian beliau dalam rumah perkahwinan itu dan satu lagi hartanah kepada responden sepenuhnya. Berhubung kesemua deposit tetap, pempetisyen hendaklah memberikan responden sejumlah RM50,000 bagi penyelesaian penuh untuk semua jumlah yang ada dalam deposit tetap itu. Responden hendaklah memindahkan 15% bahagiannya dalam perniagaan pempetisyen kepada pempetisyen sepenuhnya dan kemudian beliau tidak patut menuntut apa-apa lagi ke atasnya. Pempetisyen diperintahkan memindahkan kereta Mercedes kepada responden sepenuhnya (lihat perenggan 47).]

Notes

For cases on maintenance, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2693–2704.

For cases on custodianship of children, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2727–2837.

For cases on divorce generally, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2888–3111.

For cases on division of assets, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2977–3016 and paras 3314-3321.

For cases on matrimonial property, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 3308.

For cases on division of property, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3322–3413.

For division of matrimonial property, see 8 *Halsbury's Laws of Malaysia* (2003 Reissue) paras [140.395]–[140.397].

Cases referred to

Chia Kum Fatt Rolfston v Lim Lay Choo [1993] 3 SLR 833 (refd)
Hariram Jayaram v Saraswathy Rajahram [1990] 1 MLJ 114 (refd)
Ibbetson v Ibbetson [1984] FLR 545 (refd)
Joseph Jeganaman v Rosaline Joseph [1989] 3 MLJ 106 (refd)
Kathi-Rasen v Kathi-Rasen [1960] MLJ 57 (refd)
Lambert v Lambert [2003] 1 FLR 139 (refd)
Moses v Moses [1968] 1 MLJ 96 (refd)
Parghi v Parghi [1973] 117 Sol Jo 582 (refd)
Rose v Rose [1950] 2 All ER 311 (refd)
Shirley Kho v Kenneth Mok Kong Chua [1989] 2 MLJ 264 (refd)
Tan Keok Yin v Chea Saw Hong [1991] 2 MLJ 266 (refd)

Thevathasan v Thevathasan [1950] MLJ 255 (refd)
White v White [2000] 2 FLR 981 (refd)
Yeo Gim Tong Michael v Tianzon [1996] 2 SLR 1 (refd)

Legislation referred to

Civil Law Act 1956 s 3, (1)(a)
Divorce & Matrimonial Proceedings Rules 1980 r 11
Evidence Act 1950 s 101
Law Reform (Marriage & Divorce) Act 1976 [UK] ss 23, 24
Law Reform (Marriage & Divorce) Act 1976 ss 47–53, 54(1)(d), (2), 55–57, 58(1), 59–75, 76 (1), (2), (3), (4), 77, 78, 93, (1)(a), 106
Law Reform (Marriage and Divorce) Bill 1972 cl 45
Married Women Act 1957
Matrimonial Causes Act 1973 [UK]

Balwant Singh (Balwant Singh Sidhu & Co) for the petitioner–husband.
SY Chew (Liza Chan & Co) for the repondent–wife.

Faiza Thamby Chik J:

[1] The encls for consideration are as follows:

(i) Enclosures (1) and (28) is Divorce Petition No S4–33– 562 of 2001 filed by Chee Kok Choon. Enclosure (28) is for ancillary reliefs and in fact repeats what is stated in the respondent's amended answer (encl 27);

(ii) Enclosure (1) in Originating Summons No S1–24–1049 of 1998 filed by Sern Kuang Eng for guardianship, custody care and control and maintenance;

(iii) Enclosure (1) in Originating Summons No S4–24–2336 of 1999 filed by Sern Kuang Eng under the Married Women's Act for a declaration of her entitlement to matrimonial properties.

[2] The petitioner, in his evidence-in-chief (P1) had given evidence that the parties were married on 29 December 1990. There is one child of the marriage, Grace Chee Ruen Yi (f), born on 27 September 1991. The parties have been living in separate bedrooms since early 1997. On 30 June 1997, the petitioner left the matrimonial home. He said he left the matrimonial home as the relationship of the parties had deteriorated, and there was no longer any communication between them. The petitioner is a mechanical engineer, having graduated from Melbourne University in 1980. He started working in 1980 in Penang as an engineer. 10 years later in 1990 he married the respondent, who had completed her Form Five and a secretarial course, and was a secretary. At the time of the marriage, the petitioner was 34 years of age, while the respondent was only 26.

[3] The petitioner gave evidence that in January 1989 he had set up a sole proprietorship known as Alpha Enterprise. He started bar-coding business (a business related to data capturing in Information Technology). Later on 15 March 1991 he had set up a limited company, Triangle Hi-Tech (M) Sdn Bhd. Three of his brothers-in-law were also shareholders and directors of the company. They each had a 15% share of the company, while the petitioner held the controlling interest (the balance of 55%). The brothers-in-law each paid RM15,000 for their 15,000 shares each respectively. The paid-up capital of the Company remains at RM100,000. Two of the said brothers-in-law remain shareholders and directors. The Petitioner had bought over the share of the third brother-in-law (Mr Cheang Eng Kiang). He says he did so because the respondent could not get along with that brother-in-law, and wanted the petitioner to buy over his shares. Mr Cheang agreed to sell his shares to the petitioner. The petitioner says that he was advised by his company secretary that the company must have at least two local directors (the remaining directors were Australians). The petitioner therefore caused Mr Cheang Eng Kiang's shares to be transferred to the respondent, and made her a director, to comply with the legal requirements. He says the respondent did not pay for the said shares.

[4] The petitioner gave evidence that the respondent was a secretary when he met her. In February 1993, he needed more staff to help him run his office, and employed the respondent, paying her a salary of RM1,800 per month. She was to help him run the office, doing general and secretarial work. He had earlier employed her brother, Andy, as well in April 1991. The respondent stopped working for the petitioner since August 1996, and has not been working since then, for almost eight years. The respondent however, claims that she had contributed in terms of time and effort during the marriage, to help the petitioner acquire assets. The petitioner was cross-examined at length. It was suggested to him that when the parties were living together before they married, that the respondent contributed to household expenses. He said he paid part but not all the expenses. (Parties living together out of wedlock can surely be expected to pay their own share of expenses). It was even claimed that she had introduced the petitioner to a Japanese manager, who in turn introduced the petitioner to the bar-coding business. The respondent claims that it was she who saw the 'potential' in the bar-coding business. This was hotly disputed by the petitioner, who said it was he who did so. He had even travelled to Singapore to see how the business operates. It was never explained by the respondent why she did not make that trip, during which the petitioner decided to venture into that business, having analysed it and seen how it operates. As a trained and experienced engineer (having worked in Penang for 10 years before he married the respondent) he was able to understand the nature of the business with his background in Information Technology. The respondent had left school after Form Five and was working as a secretary and was eight years younger than him. On a balance of probabilities, the evidence of the petitioner is more credible than that of the respondent. Then there was a

suggestion that the standing instruction to the Scotia Bank was to debit the respondent's account for the mortgage instalments for the matrimonial home. This was met with the response that it was true but the petitioner banks in money into the respondent's account so that the mortgage payments could be met. Clearly therefore the respondent's only contribution appeared to be to allow her account to be used to facilitate the mortgage payments — and that too only in respect of the matrimonial home. Similarly, the respondent's contention that she continued to work at Kajima so that she could use her income to maintain the parties, should be seen in that light. The respondent had done some 'side-business' (book binding) with Kajima (her employer) and that the petitioner's business had benefited — but it turned out that the profits were small; that she had shared the profits with her colleagues; and that the petitioner's business received only negligible commissions for allowing his invoices to be used. Then there was reference to the wife selling a puppy to make some money. There was no evidence as to what that money was used for. It was claimed that she helped out in the respondent's office with some typing, and it turned out that she did this only occasionally. (She would come over to the petitioner's office presumably so that they could go home together). The petitioner was single-handedly handling all the operations of the business in the beginning. When we consider the nature of the business, it is perfectly logical for him not to need the services of more staff, including the respondent in the beginning.

[5] The respondent also said that she made some payments for the matrimonial home ie by withdrawing from her EPF account ie RM12,790.35. The petitioner said he too had withdrawn from his EPF account. In any event, as the said property is in joint names, the respondent is more than compensated for whatever contribution she may have made, by having a legal interest in half the said property. It is noted that the petitioner is prepared to hold his half share on trust for his daughter. (The respondent continues to reside in the said property).

[6] In any event, his 10 years of working life as an engineer must mean that he was not without resources. He was not cross-examined on this point. How the respondent's salary (which was barely enough for her own needs) could have helped is not clear. The evidence shows that the business picked up fairly quickly and the respondent's contention is therefore not credible. Even her evidence that she had 'bought' the shares in the company is warped. She relies on a statement in the company's records that the shares had been 'bought'. That does not mean she paid for them, and her reliance on that document (without being able to adduce evidence of actual payment by her) is typical of the tone of her evidence throughout. The burden of so proving was on her under s 101 of the Evidence Act 1950. When one consider the totality of the evidence, it was more likely than not that she made no such payment, as the petitioner had caused the said shares to be transferred to her to fulfil the legal

requirement of two local directors, after one of his brother-in-law decided to give up his shares. As for direct payments towards the acquisition of the matrimonial home, even if the respondent did make some mortgage payments (the rest having been made by the petitioner over the years) the fact that the said property is in joint names more than compensates her. The petitioner is not claiming that half share back for himself. In fact he is prepared to hold his own half share on trust for the child, so that the respondent and the child may continue to reside at the matrimonial home. The emphasis on the 'side-business' and the sale of a puppy did not lead to any evidence of any substantial financial contribution by the respondent towards the acquisition of matrimonial assets. Indeed, after the respondent stopped working for the petitioner some eight years ago, she has not shown any enterprise to help with the family's finances, although the only child, Grace is already 13 years of age. The petitioner continued to be the sole provider. Although the law does provide that a husband may be ordered to pay maintenance to his wife or former wife, it does say that such orders may be varied if there is any material change of circumstances. That the only child of the marriage no longer needs day to day care is surely one such circumstance. In the case of *Thevathasan v Thevathasan* [1950] MLJ 255, where the court had referred to the dicta of Lord Denning in *Rose v Rose* [1950] 2 All ER 311, that 'if the wife is a young woman with no children, and obviously ought to go out to work in her own interest, but does not, than her potential earning capacity ought to be taken into account'.

[7] The petitioner gave evidence that the respondent has no knowledge of the computer business, and disagreed that she was good at marketing or public relations. (In any event, she was a paid employee of his business). It was even suggested to the petitioner that the respondent had a miscarriage because of her work, even though there was absolutely no medical evidence of this. It was also suggested that because the respondent had attended an exhibition and helped out, that she had therefore contributed to the petitioner's business. The totality of the evidence shows that the petitioner has always been the alter ago of the business — and continues to be so, whereas the respondent–wife had even left her paid employment with the petitioner and has not been working for him for almost eight years now. The respondent's direct contribution, therefore, was only towards the acquisition of the matrimonial home (to a small extent) — yet she has a half share in that property. It is also noted that the petitioner had even given her a half share in two properties, which he is prepared to give her (although those half shares are also matrimonial assets). In totality therefore, the petitioner's proposal as contained in his amended answer (in para 16, that he is prepared to let the respondent have the half shares of the three properties that he had caused to be registered in joint names) is both reasonable and fair. This is more so since he is also prepared to hold his own half share of the matrimonial home on trust for his daughter until she is 25, as this effectively means that the petitioner can continue to occupy the matrimonial home.

[8] The respondent has been paying a monthly sum of RM3,200 as maintenance for the respondent and the child. As the respondent continues to reside in the matrimonial home free of rent, this sum is sufficient for their needs. In view of the fact that the petitioner is prepared to hold his half share of the matrimonial home on trust for the child until the child attains the age of 25, the respondent and the child can continue to reside at the matrimonial home, and the sum of RM3,200 is a generous sum, for their other needs (other than accommodation). The respondent claimed that she wants RM5,600 per month. She later hiked up this figure to RM6,700 per month. The income of the petitioner can be seen from his Tax Returns (Bundle C — exhs 18 and 19). His gross income was as follows:

(1) Year of Assessment 1996 ...RM87,739
(2) Year of Assessment 1997 ...RM100,000
(3) Year of Assessment 1998 ...RM100,000
(4) Year of Assessment 1999 ...RM70,000
(5) Year of Assessment 2000–01 ...RM70,000

[9] The total of those six years was RM427,739, and works out to an average of RM71,290 per annum, or RM5,940 per month. Based on this income, the fact that the petitioner has continued to comply with the order of RM3,200 per month as maintenance is commendable. If the usual practice is followed, the respondent may well be entitled to less. While the law envisages taking into account the means and needs of the parties, the 'needs' must be reasonable. When we consider that the respondent has continued, and is free to continue to occupy the matrimonial home, a sum of RM3,200 per month for her and the only child is not only reasonable but generous. The matrimonial home was purchased on 12 August 1989, while the parties only married on 29 December 1990, some 16 months later. There is some dispute by the respondent as to whether the petitioner paid for renovations and furniture and fittings, but she does not claim she paid for these items either. In the circumstances, if the petitioner cannot produce receipts for such expenses some 15 years after the event, it can hardly be held against him. It is not disputed that at least for the past eight years, the respondent's contribution (since she stopped working for the petitioner) was only indirect. Section 76(3) of the Act speaks of 'looking after the home and family'. Here the family unit had broken up more than seven years ago. The respondent had only herself and the daughter to look after. The petitioner continued to work hard to provide them with generous maintenance, while they continued to reside in the matrimonial home. He even provided the respondent with a Mercedes car. Section 76(4) states that the party by whose effort the assets were acquired shall receive a greater proportion. Equality of division is therefore not the only purpose and purport of s 76 of the Act. Equality is provided in s 76(2). Where s 76(4) applies, the division cannot be equal. In the nature of things, different words mean different things in different situations. The word 'acquired'

is not the same as 'purchased' as ordinarily understood. In a family law setting, especially in terms of division of matrimonial assets, a down-payment may have been paid, and one party may continue mortgage instalments for the next 15 or 20 years. In such a case, the 'acquisition' continues until the asset is fully acquired. For example, in the case of an EPF balance, a certain sum is 'acquired' before marriage; the balance is acquired during marriage; and further acquisition continues even after a divorce. It is only the portion 'acquired' during marriage that can be considered a matrimonial asset. In our case, only a very small part of the assets were 'acquired' before the respondent stopped working. (She stopped in August 1996). Even if her evidence is believed (and I think that it is grossly exaggerated) she could not have made a direct contribution for the past eight years, and s 76(4) must therefore come into play in any event. Indeed, not much of the purchase price could have been paid even for the assets purchased before that. A far greater part would have been paid after that. It is relevant to note the dates of purchase of the fixed assets, which were as follows:

12 August 1989 — (the matrimonial home)

12 April 1993 — the Bukit Beruntung Bungalow

12 April 1993 — the terrace factory at Bukit Beruntung

26 July 1994 — Kelana Parkview Aapartment

16 November 1994 — Kelana Business Shop-office

14 March 1996 — Tropicana Townhouse

27 March 1997 — Mutiara Oriental Condo.

[10] From the above analysis it can be seen that the petitioner obviously had to bear the sole brunt of repayment of mortgages of the various properties 'purchased' during the marriage but acquired over the years, with some not yet fully acquired. Section 76(4) enjoins the court to give a greater proportion to the party by whose sole effort the assets were acquired, and in the present case, the court has to decide that proportion. The suggestion in the respondent's submission that all the assets should be divided equally (as if the acquisitions come under c 76(1)) is therefore clearly untenable. It is seriously misleading to submit that conduct of the parties affects the division of assets. Our s 76 was based on legislation originating from Kenya, and the English legislation has no direct application. In any event, even the case of *Ibbetson v Ibbetson* [1984] FLR 545 is wrongly applied. The English legislation includes reference to conduct of the parties, in s 25 of the 1973 Act, both in regard to the making of lump sum orders under s 23 and property transfers under s 24 of the Act. There is no such consideration in our s 76 although it is there in our s 78 for maintenance.

[11] It is observed that the petitioner had in fact purchased a bungalow in Penang in 1982 (well before he even met the respondent) with his brother, Chee Kok Sing. They later sold it. He then acquired the following assets:

(1) Double storey terrace house (No 102, Jalan SS 25/4, Taman Bukit Emas, Petaling Jaya.

The petitioner put the respondent as a co-purchaser. The purchase price was RM131,800. This property was purchased in August 1989 before the marriage. The petitioner drew RM20,000 from his EPF account and paid RM19,540 in cash. He took a bank loan of RM92,260 and paid the monthly instalment of RM1,100. The respondent did not make any payment towards these initial costs of acquisition. She was earning less than RM1,200 in 1989. The petitioner says the respondent did have the financial resources to make any such contribution. Even before the marriage, the respondent spent about RM15,000 on renovations to the said property. He also spent about RM10,000 on furniture and fittings and paid the legal fees. It is evident that the respondent was in no position to contribute such large sums herself, yet she became a co-owner of this property, at the instance of the petitioner. The petitioner has continued to meet the loan repayments.

(2) The bungalow at Bukit Beruntung (Lot No B66, Zone 7, Bukit Beruntung

The petitioner gave evidence that on 12 April 1993, he purchased a double storey bungalow at Bukit Beruntung, again putting the respondent as a co-purchaser. The purchase price was RM274,983. He paid a sum of RM66,000 took a term loan of RM109,000 and an overdraft of RM100,000. The said property has been lying vacant. The monthly mortgage instalment is RM1,800 which the petitioner has been paying. The petitioner says that the respondent did not contribute to the purchase of this property.

(3) The Tropicana townhouse (Parcel No 25A Building No 25, Type E5A)

The petitioner gave evidence that on 14 March 1996, he had purchased an apartment at the development known as Tropicana townhouse for RM339,840 again putting the respondent as a co-purchaser. He paid a down-payment of RM68,440. He took a term loan of RM135,700 and an overdraft of RM135,700. He also spent about RM15,000 on renovations and fittings. The said property is tenanted for about RM1,300. The loan repayment is RM3,500 per month which the petitioner has been paying. The petitioner says the respondent did not contribute to the purchase of this property.

[12] Apart from the above three properties which the petitioner had purchased (and for which he had included the respondent as a co-purchaser) the petitioner had also purchased the following properties, in his own name:

(1) A terrace factory at Bukit Beruntung (Lot 86, Type SSTF)

This was purchased on 12 April 1993 by the petitioner. The purchase price was RM110,000. It is not tenanted.

(2) An Apartment at Kelana Parkview (Lot No 311, Blok E1 Jalan SS6/2, Kelana Jaya)

The purchase price was RM140,000. This is tenanted.

(3) A Shop-Office at Kelana Business Centre (Parcel No 12–L9. Shop-Office Block, KBC)

This was purchased on 16 November 1994 for RM370,000 by the petitioner. The petitioner paid RM200.000 in cash and took an overdraft of RM170,000. This is the petitioner's present office.

(4) An apartment at Mutiara Oriental Condo (No D13–09, Jalan BM1/8, Bukit Mayang Mas, Petaling Jaya)

This was purchased on 27 March 1997 for RM400,000 by the petitioner. The petitioner paid RM200,000 in cash and took an overdraft of RM100,000. This is his present residence.

(5) Mercedes Sports Motorcar (WDX 4444)

This was purchased by the petitioner on 27 August 1996, for RM228,000. It is presently being used by the respondent.

(6) Proton Perdana (PDF 9675)

This was purchased by the petitioner on 23 January 1996 for RM89,537.90 and is used by him.

(7) Proton Wira

This was purchased on 4 April 1995 for RM43,627.24 and is used by staff of the petitioner.

(8) Fiat Coupe

This was purchased by the petitioner in 1997 for RM144,700. He took a loan of RM100,000 and paid the hire purchase instalments.

[13] All the above assets are detailed in the statement of agreed facts (Bundle D). Apart from the above assets, the petitioner also had the following:

(i) A unit fund worth only RM75,000 now but worth RM150,000 when he purchased it);

(ii) RM280,000 at the Citibank;

(iii) RM61,000 at the Allied Bank.

[14] In his amended reply to the respondent's answer, the petitioner states that the respondent did not contribute directly to the acquisition of these assets. Yet he states (in para 16) that he is prepared to let the respondent retain the half share of the three properties in joint names (including the matrimonial home). At the time the said reply was filed, the total residual value of these

assets was RM822,303.89. As the petitioner has continued to meet the loan repayments, the residual value of these assets would be much more now. He is even prepared to hold, his half share of the matrimonial home (where the respondent continues to reside with the child of the marriage) on trust for the said child, until she attains the age of 25 (para 25 of the amended reply).

[15] The respondent even called witnesses to buttress her claim that she had helped the petitioner in his business. The respondent–wife seeks to show that she had contributed to the business operated by the petitioner–husband. She relies heavily on the evidence of four of her friends and her brother. All these five witnesses had sworn their affidavits (in the proceedings in Originating Summons No S1–24–1049 of 1998) on the same day. Wong Chin Yew 'assumed' that the petitioner and the respondent were co-owners of the business. He gave no reasons for such an assumption. He does not even address the fact that both the respondent and her brother, Andy were employees of the business at the material time, and could be expected to be the ones to communicate with him. He does not speak of any such communication after the respondent stopped working for the petitioner in August 1996, some eight years ago. Yip Sow Ngan, a colleague of the respondent at Kajima, was only able to give evidence of the fact that she had received some materials on behalf of Kajima from the respondent (in relation to the 'side-business' of the respondent and her colleagues at Kajima, dealing with albums, etc.). It is in evidence that the 'side-business' was very small and did not yield much profit. He proceeded to make a bare statement that the respondent had sacrificed a lot for her husband, without giving any material particulars to support it. The evidence of Ng Chee Yong was quite similar to that of Wong Chin Yew and lacking in relevant particulars, and in fact shows an obvious bias against the petitioner. Another friend of the respondent, Loh Siew Lee (f) also gave evidence of the 'side-business' (albums, bookbinding, etc). Her evidence (as with the others) was very general without dates and time-frames and not substantiated with material particulars. She anchored her belief that the respondent contributed 'a lot of energy' to the petitioner's business by reference to just one exhibition where the respondent was alleged to have helped out. Finally, the brother of the respondent Sern Khim Seng, himself an employee of the petitioner also gave very general and largely hearsay evidence, including what he believed the respondent did while she was at Kajima. What is relevant is that all these five supporting witnesses were only able to give general evidence of a short period of time (when the respondent was still with Kajima) and their evidence of the period when she was employed by the petitioner is only that of work done by her as an employee. These were all partisan witnesses, and their evidence does not in any way advance her case, as they were merely parroted the statements in their evidence-in-chief, and much of their evidence was hearsay and may be disregarded. They all admitted to being friends of the respondent. Their personal knowledge was limited to minor instances of little significance and need not be addressed as they do not add much to the respondent's case.

While it is true that in all fairness to the respondent, she may have worked a little harder than the average employee since she was working for her husband, to say that that contribution over a very short period of time entitles her to half of all matrimonial assets, would be stretching the meaning and purport of s 76 of the Law Reform (Marriage & Divorce) Act 1976. Contrary to her pleadings, the respondent has not been able to show any significant contribution by her to the petitioner's success in his business. She was a paid employee for a short period and has not worked for close to eight years now. In fact, in his affidavit balasan lanjutan affirmed on 28 May 1999 in OS No S1–24–1049 of 1999 the petitioner had set out in detail the relevant events in the lives of the parties. That affidavit was prepared by his previous solicitors and is largely an accurate reflection of the state of affairs.

[16] Counsel for the respondent argued that the respondent had contributed to the petitioner's acquisition of assets after their separation. To support her contention counsel quoted the case of *Yeo Gim Tong Michael v Tianzon* [1996] 2 SLR 1 where the Court in Singapore stated that so long as a wife has children to care for during the period of separation, she continues to contribute by 'caring' (the term used in the Malaysian Act). This argument it is argued is in tune with the current developments in England. In *White v White* [2000] 2 FLR 981 the House of Lords held:

> Held, dismissing both appeals:
>
> (1) The objective implicit in the provisions of Part II of the Matrimonial Causes Act 1973, s 25 was to achieve a fair outcome in financial arrangements on or after divorce, giving first consideration where relevant to the welfare of children.
>
> (2) Fairness required the court to take into account all the circumstances of the case. In seeking to achieve a fair outcome, there was no place for discrimination between husband and wife and their respective roles. Fairness required that their division of labour should not prejudice or advantage either party when considering their contributions to the welfare of the family under s 25(2)(f). If each in their different spheres contributed equally to the family, then in principle it mattered not which earned the money and built up the assets. Before making an order for division of assets, a judge should check his tentative views against the yardstick of equal division. As a general guide, equality should be departed from only if, and to the extent that, there was good reason for doing so. The need to consider and articulate reasons for so doing would help the parties and the court to focus on the need to ensure the absence of discrimination.
>
> (3) Section 25(2) did not rank the matters listed therein in any hierarchy and other matters might also be relevant. The importance and weight to be attached to them depended on the facts of the particular case. Financial needs was only one of the several factors to be taken into account in determining a fair outcome.

The available assets of the respondent did not as a matter of principle become immaterial once the claimant's financial needs were satisfied. When considering 25(2)(b), confusion would be avoided by courts ceasing to employ the expression 'reasonable requirements' and returning to the statutory language of 'needs', which preserved the necessary degree of flexibility.

[17] In *Lambert v Lambert* [2003] 1 FLR 139 the Court of Appeal held:

Held, allowing the wife's appeal and awarding her 50% of the family assets:

(1) It was unacceptable to place greater value on the contribution of the breadwinner than that of the homemaker as a justification for dividing the product of the breadwinner's efforts unequally between them. There must be an end to the sterile suggestion that the breadwinner's contribution weighed heavier than the homemaker's. The nature of the contribution was intrinsically different and incommensurable and each should be recognised as no less valuable than the other (see paras (27), (38)).

(2) Special contribution remained a legitimate possibility, but only in exceptional circumstances, and was not a factor in this case; a good idea, initiative, entrepreneurial skill and extensive hard work were insufficient to establish special contribution. The danger of gender discrimination resulting from a finding of special financial contribution was plain, and if all that was regarded was the scale of the breadwinner's success, then discrimination was almost bound to follow, since there was no equal opportunity for the homemaker to demonstrate the scale of her comparable success. There might be cases where the product alone justified a conclusion of special contribution, but absent some exceptional and individual quality in the generator of the fortune a case for special contribution must be hard to establish. The concept of exceeded expectations as the test for special contribution was rejected (see paras (45), (46), (50), 52), (69), (71)).

(3) The duty of the court to assess each and every one of the s 25(2) criteria bearing on outcome did not require a detailed critical appraisal of the performance of each of the parties during the marriage. Couples who could not agree division were entitled to seek a judicial decision without exposing themselves to the intrusion, indignity and possible embarrassment of such an appraisal (see para (38)).

(4) A distinction must be drawn between an assessment of equality of contribution and an order for equality of division; a finding of equality of contribution may be followed by an order for unequal division because of the influence of one or more of the other statutory criteria as well as the over-arching search for fairness (see para (38)).

(5) It was the objective judicial consideration of fairness rather than the parties' subjective understanding that must determine outcome; equal division would not guarantee that the parties would depart

without a sense of grievance and with a sense of being equally valued (see para (40)).

(6) The judge fell into error in concluding that both parties would be able to satisfy their financial needs for the foreseeable future; the judge's division of assets required the wife to amortise her capital in order to meet the cost of living in the property which the judge had found that she reasonably occupied, and there was no justification for requiring the wife alone to amortise capital (see paras (60), (61), (75)). The duration of the marriage and the parties' ages were also relevant consideration (see paras (56), (57)).

[18] It is observed that a discussion of the modern approach can be seen in an article by David Hodson with Miranda Green and Nadine De Souza, Solicitors entitled *Lambert — Shutting Pandora's Box in January* (2003) Fam Law p 37. The article started by stating (Talking about foreign influences on development of English Case-Law) the writers continue:

> In Greek mythology, Pandora's box, once emptied, contained only Hope. *Lambert v Lambert* [2002] EWCA Civ 1685, [2003] 1 FLR 139 is possibly the most important case since *White v White* [2000] 2 FLR 981. The court tries to close the Pandora's box of 'special contribution'. Is it too much to hope it brings certainty, better resolutions and fairness? This article looks at the case, its background, the judgment and its implications.
>
> *White v White* [2000] 2 FLR 981 was the most radical family law finance decision of our generation. It was also unexpected — the unfairnesses and unhappinesses about our law as, for example, expressed by Butler-Sloss LJ (as he was then) and Peter Gibson LJ in *Dart v Dart* [1996] 2 FLR 286 and sounded by the Government in Supporting Families (November 1998) were presumed to be correctable only by primary legislation. Instead, White moved us towards equality in some cases as a means to overcome possible gender discrimination, especially inherent in reliance on 'reasonable requirements'. Lord Nicholls of Birkenhead LJ said that:
>
> > If, in their different spheres, each (spouse) contributed equally to the family, then in principle it matters not which of them earned the money and built the assets. There should be no bias in favour of the money-earner and against the homemaker and the child-carer.
>
> In making an order:
>
> > a judge would always be well advised to check his tentative views against the yardstick of equality of division.
>
> In perhaps the crux sentence, he said:
>
> > As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination.

> But some decision of higher courts conflicted. And so the litigation flowed and costs increased with the call to arms in the battle of special contribution. We all had our own lengthy contribution affidavits in our precedent banks, to run off as needed, to show the reasons to depart from, or stick with, equality. The possibility of getting a pro- or anti-equality judge was so high that the claimants went onwards to financial dispute resolution (FDR) or trial.

[19] Talking about foreign influences on development of English case law, the writers continue:

> In addition to the recent post-*White* cases in this jurisdiction, Thorpe LJ in *Lambert* had the benefit of two foreign cases. White is not just an English phenomenon. It is a theme in other jurisdictions across the world. We believe these cases demonstrate two international trends. First, in almost all cases it is unacceptable in law and public policy to place greater value on the contribution of the breadwinner than that of the homemaker as a justification for departing from equality. Secondly, it is undesirable for courts to 'mark' the parties on their respective performances,

M v M (Financial Provision: Valuation of Assets) [2002] Fam Law 509 was a Northern Ireland case that dealt with overall assets of about 3.67 million pound. During the course of the case the husband raised his contribution in the workplace. McLaughlin J noted:

> but to concentrate on that (husband's work contribution) and fail to recognise that, whilst he toiled at work on company business, Mrs. M from early in the morning was getting the children ready for school, taking them there, running the home during the day, collecting them after school, cooking and cleaning, nurturing them by ferrying them to social, sporting and recreational activities, supervising homework and tutoring them when required, would be to be guilty of the very kind of discrimination warned against by Lord Nicholls ... In the context of this family's life these admirable qualities of both parties are to be considered of equal value.

The second was Australian, *Figgins v Figgins* [2002] FamCA 688, an appeal to the full court in a big money case with inheritances and a relatively short marriage. Again, focusing on the party's contribution was criticised. Nicholoson CJ:

> We are troubled that in the absence of specific legislative direction, courts consider they should make subjective assessments of whether the quality of a party's contributions was 'outstanding'. It is almost impossible to determine questions such as: Was he a good business/artist/surgeon or just lucky? Was she a good cook/housekeeper/entertainer or just an attractive personality? We think it invidious for a judge to in effect give 'marks' to a wife or husband during a marriage. We think that this doctrine of 'special contribution' should, in an appropriate case, be reconsidered. We think that the decision of the House of Lords in *White v White* gives force to these concerns.

> We reject the concept that there is something special about the role of the male breadwinner that means that he should achieve such a preferred position in relation to his female partner. To do so is to pay mere lip service to gender equality. Marriage

is and should be regarded as a genuine partnership to which each brings different gifts. The fact that one is productive of money in large quantities is no reason to disadvantage the other.

The decision in *Figgins* saw the court depart from the earlier decision in *Lynch v Lynch* [2000] FamCA 1353 where special contribution had been found and which had been an influence in *Cowan*. Both the above cases supported and reflected the judgment of Coleridge J in H-J and the requirement in *White* to avoid gender discrimination, but did not seem to support *Lambert* at first instance.

The Court's Judgment

In his judgment in *Lambert*, Thorpe LJ, giving the lead judgment, focussed on the role of contribution in a case, and the importance of considering all of the s 25 factors and not just contribution.

[20] In an article on The Laws in Singapore and England Affecting Spouses' Property in Divorce by Leong Wai Kum (5 June 2001, SJLS Case) comment on *White v White*, *Cowan v Cowan*; speaking on (Singapore) Courts accept purpose of power to credit non-financial contribution writes:

The courts in Singapore began to deliver dramatic decisions towards the end of the decade from the enactment of the power possibly because the applications became better argued in court. In the first major reported decision the High Court of Singapore lay down three principles that continue to define the power. There are summarised as '(f)irst, any asset acquired during marriage is liable to division, second, the power is to be exercised in broad strokes and, third, the aim of the court is to reach a fair and reasonable division of the assets between the spouses. Chief Justice Yong Pung How in the Court of Appeal affirmed these when his Honour observed '(w)e are of the opinion that (the provision) gives the court a very wide power to order the division of matrimonial assets in the fairest way possible between the parties'.

There are memorable judicial expressions of the purpose of the power being to give credit for efforts in homemaking and child caring as in 'the enactments are meant .... To provide for a just apportionment for the 'homemaker'. These expressions are remarkable in a Common Law country that continues to operate under the concept, during the subsistence of marriage, that marriage has minimal effect on spouses; interest in each other's property. The power to divide matrimonial assets gives due credit to these non-financial contribution in order to balance the entitlement to proprietary interest that the spouse who worked and was the major breadwinner of the family would obtain for his or her efforts.

[21] Do English authorities apply to division of assets under s 76 of our Act, in the light of s 47 of our Act? I am of the opinion that our law does not follow any English legislation, and English cases have to be applied with caution. In any event the English cases are persuasive in nature only. Indeed, cl 45 in the Law Reform (Marriage and Divorce) Bill 1972 was referred to in the explanatory statement to the Bill as follows:

> Clause 45 is a general provision providing for principles to be followed in the event of there being any lacuna in the law.

[22] Therefore the drafters of the bill itself felt that s 47 did not give liberty and licence to apply English principles, but only where there is a lacuna in our law. If our law is clear, our law should be applied. This is especially so in respect of recent developments of the matrimonial law in England, where the courts have held the wife's indirect contribution as wife and mother to be equal to that of the income-earning or income-generating husband. Such an interpretation would go against the regime of direct and indirect contributions in our s 76. Two different considerations apply in ss 76(2) and 76(4) and equality across the board was clearly not envisaged by our legislature. Section 3 of the Civil Law Act 1956 cannot be of assistance, as that has a cut-off dated of 7 April 1956. (Section 3(1)(a) of the Civil Law Act 1956). Recent developments in England cannot therefore even be considered under that section. Indeed, s 3(1) of the Civil Law Act, 1956 says, 'Save so far as other provisions has been made or may hereafter be made by any written law in force in Malaysia'. Our Parliament has made 'other provisions' by passing the Law Reform (Marriage and Divorce) Act 1976. There is therefore no question of following the developments in England, unless our Parliament deems it fit to review and amend the existing provisions of our Act. My view is fortified by the view of the late Professor Mimi Kamariah Majid (May Her Soul Rest In Peace). In her book, *Family Law in Malaysia* (MLJ 1999) at p 148, she stated that s 47 only applies to suits and proceedings under Part VI of the Act. Professor Tan Hock Lin of the National University of Singapore is of the same view. In his book, *Conflict Issues in Family and Succession Law* (Butterworths 1993) he says at p 300 that our s 47 only applies to divorce, nullity and judicial separation proceedings (under Part VI) excluding ancillary relief, which is dealt with in other parts of the Act, At p 299 he says:

> In England the jurisdiction to order maintenance in divorce, nullity or separation proceedings is ancillary. And on p 300 he says, s 85 of the Women's Charter directs that the courts are in such maintenance cases to apply English principles as nearly conformable as possible to the provisions of the Charter. Nothing similar appears in Malaysia; but the counterpart to s 85, namely s 47 of Act 164, refers only to principles in divorce, nullity, and judicial separation proceedings, excluding it seems ancillary matters such as maintenance and custody which are dealt with in other parts of the Act.

[23] On p 390, he further says:

> The importation of English principles must occur in all suits and proceedings under Part IX (Part VI in Malaysia. There must be a suit or proceeding under the Part before these principles are binding on the Court.
>
> There appears then to be two separate regimes in operation. The common law reception under the Second Charter (Civil Law Act 1956 in Malaysia) continues to supply the common law principles and these have force of law in questions of maintenance and succession which are outside Part IX (Part VI in Malaysia). In cases

within Part IX (Part VI in Malaysia), a separate regime has been installed as a result of the enactment of s 85 (s 47 of Act 164).

[24] In conclusion he says at p 391:

> Section 85 (Section 47 of Act 164) is not given comprehensive coverage. It relates to proceedings under Part IX (Part VI in Malaysia) only. So if the Courts must apply statutory principles in other proceedings outside Part IX (Part VI in Malaysia) where the question of divorce, nullity of recognition arises, they must apply common law principles.

[25] It cannot be denied that the petitioner devote all his time and energy to his business. The respondent's occasional effort (as in the case of one exhibition) would hardly count in the ordinary case, to the success of such a business. There was no skill or expertise possessed by the respondent that could have made a difference. It has not been challenged that only the petitioner had the necessary skill, knowledge and expertise to run the business. The respondent's own evidence seems to limit her limited and very occasional assistance to typing and sending faxes. She was also his employee for a short time, and for many years now, has had nothing to do with his business which he continues to run entirely on his own. It is apparent that the petitioner was the alter ego of the company and the brains behind the business. The respondent has not been able to give credible evidence that she 'paid' for her shares. That the accounts show the shares were paid for does not mean she came up with the money. If as she claims, she paid for the shares, there should be evidence from her of payment to the person from whom she acquired the shares — and there is no such evidence. The petitioner's evidence that he caused the shares to be transferred to her was unchallenged, and indeed, the fact that the petitioner's and his brothers-in-law were the promoters and prime movers of the company shows that the respondent was never ever considered a 'partner'. If she was, as she claims a 'partner' she could have arranged for her shares to be held by a nominee her own brother worked for the petitioner, and yet the shares were with the petitioner and his brothers-in-law, until the petitioner caused the shares of one brother-in-law to be transferred to the respondent for reasons given by him. It is not denied that after she stopped working, the respondent would have made 'indirect' contributions as wife and mother and as correctly stated by counsel, her contributions would fall to be considered under ss 76(3) and 76(4) of the Act. This brings me to the consideration of these sub-sections and the recent developments in English Law. Section 47 of the Act states that, subject to the provisions contained in this part (Part VI) ie ss 47 to 75, English principles should be applied (in the interpretation of our law). For the removal of doubts, I propose to deal with those sections in Part VI of the Act, ie s 47 to 75 to show which sections invite the application of English legal precedent.

Section 47	itself is a statement of general principle, as stated earlier.
Section 48	governs the power of the court to grant relief (based primarily on recognition of the marriage, registration and domicile). (This section is partly in *pari materia* with s 1 of the English Matrimonial Causes Act 1973 and English precedent would generally apply).
Section 49	gives the court additional jurisdiction in proceedings by a wife. (English precedents would not apply as wives in England now have an independent domicile). (By s 4 of the Domicile and Matrimonial Proceedings Act 1973).
Section 50	provides for restriction on petitions within two years of marriage. (in *pari materia* with the English s 3, except as to the term of years) (English precedents certainly apply).
Section 51	provides for dissolution on grounds of conversion to Islam. (There is no English equivalent and there is no question of applying English law).
Section 52	Dissolution by mutual consent. (The English provision provides for consent coupled with separation. English precedents apply as to 'consent').
Section 53	Breakdown of marriage the sole ground for divorce. (Similar to the English s 1 but not in *pari materia*).
Section 54	Proof of breakdown Similar to s 1(2) of the English Act but five fact situations instead of four).
Section 55	Provisions designed to encourage reconciliation. (The English s 6 imposes a duty on the solicitor to discuss with the petitioner the possibility of reconciliation).
Section 56	Reference of agreements to court. (in *pari materia* with s 7 of the English Act).

Section 57	Contents of Petition (No equivalent in the English Act).
Section 58/59	Damages for Adultery (Damages for adultery have been abolished in England). (Section 4 Law Reform (Miscellaneous Provisions) Act 1970).
Section 60/61	Hearing of petition and proceedings thereafter. (Similar to ss 9 and 25 of English Act)
Section 62	Remarriage of divorced persons. (No English equivalent.)
Section 63	Proceedings for decree nisi of presumption of death and divorce. (in *pari materia* with s 19 of the English Act).
Section 64–66	Judicial Separation. (similar to ss 4, 17 and 18 of the English Act).
Section 69	Void marriage. (Similar to s 11 of the English Act).
Section 70	Voidable marriages. (in *para materia* with s 12 of the English Act)
Section 71	Bars relief where marriage is voidable. (Similar to s 13 of the English Act).
Section 72	Marriages governed by foreign law or celebrated abroad under Malaysian law. (Similar to s 13 of the English Act).
Section 73	Effect of decree of nullity in case of voidable marriage. (in *pari materia* with s 16 of the English Act)
Section 74	Collusion not to be bar to relief in cases of nullity. (in *pari materia* with s 6 of the Nullity of Marriage Act 1971, which was itself later repealed).
Section 75	Legitimacy where nullity decree made. (No equivalent in the English Act).

[26] It is at once apparent that English precedents would apply to the interpretation of our sections (in Part VI of our Act) which are in pari materia with English provisions on which are similar enough to the English provisions. It is also equally apparent that English principles cannot apply where our legislation has no English equivalent (such as our ss 51, 55 and 58 and 59). If s 47 were to be extended to the rest of our Act, certainly English principles would also not apply, for example, to our s 76, which governs division of matrimonial assets and s 106 which makes reference to a Marriage Tribunal or Conciliatory Body mandatory. Seen in this light, it is apparent that recent developments in English judge-made law as to the rights of a spouse in division of matrimonial assets, cannot be blindly followed here. We have specific provisions in s 76 of our Act, which provides for two situations – the first where there is direct contribution by the other spouse, and the second where the contribution is indirect. In the first case, the law provides for equality of division. In the second case, it provides that in any case, the party by whose effort the assets were acquired shall receive a greater share. This is not consistent with any principle of equality of division in all cases. This specific provision in our legislation (for which there is no equivalent in English law) cannot be ignored. Indeed, s 47 was obviously only intended to cover situations where our law is in pari materia with, or similar to English law. It just as obviously cannot apply where there is no equivalent, and especially when our law has a specific provision which is not available in England. It would be an affront to our sovereignty to suggest that we should ignore the express provisions of our own legislation in favour of what relief the High Court of Justice in England would grant in such a situation. In the circumstances, it is my observation that the recent developments in England (in *White v White* [2000] 2 FLR 981 and *Lambert v Lambert* [2003] 1 FLR 139) have no place in our law, as our law has specific provisions which are not modeled on English law. These cases cannot apply here, in the light of our specific provisions as discussed earlier.

[27] My references to the articles were to show a shift in judicial thinking in the west towards the economic rehabilitation of women after divorce. Even our law does not provide that the wife should get a pension for life from the husband. It only gives the court power to order maintenance. Such orders may be varied. It would not be out of place for the courts to give direction to public policy by encouraging women to be economically independent (instead of dependent) in appropriate circumstances. With the increasing emphasis on equal rights, there should be a corresponding emphasis on equal responsibilities. However, the crux of the matter is that the respondent's contribution was indirect, and can only attract the provisions of s 76(3) and (4) of the Act and invite division of assets accordingly.

[28] The evidence of the income of the petitioner is clear, and so are the principles for ordering maintenance, ie the means and needs of the parties. Fault of the parties is only relevant in the case of maintenance for the wife

(s 78) which follows upon s 77, which gives the court that power. It has no relevance to the issue of maintenance for children under s 93.

[29] The evidence of the petitioner was unshaken in cross-examination. On the other hand, the 'supporting cast' of witnesses for the respondent did nothing to buttress her case except to parrot the same line, without much substantive evidence of their bare statements.

[30] The petitioner relies on s 54(1)(d) of the Act, ie separation of two years. The respondent admits to this in para 8(b) of her answer. However, she refuses to consent to a decree being granted 'due to her religious faith'. While she had alleged adultery, she had failed to comply with s 58(1) of the Act by naming a co-respondent. The pleading is therefore bad in law, and may not be relied upon. (See also to r 11 of the Divorce & Matrimonial Proceedings Rules 1980). As for her allegation of 'intolerable conduct' the respondent has failed to plead as per paragraph 54(1)(b) of the Act, ie 'that the (Petitioner) has behaved in such a way that the (Respondent) finds it intolerable to live with the (Petitioner). In the absence of any pleading that she found it intolerable to live with the petitioner, the respondent has failed to establish irretrievable breakdown as envisaged in the Act, and must now depend only on the two years of living apart to establish the breakdown, to which she has admitted. Therefore, firstly, the petitioner has disputed the said allegations of adultery and unreasonable behaviour and secondly, the respondent had failed to properly plead the same in any event. Therefore I think the marriage should therefore be dissolved on the petitioner's allegation of living apart alone under s 54(1)(d) of the Act. The issue of breakdown of the marriage is only relevant in two areas, ie:

(1) The grant of a decree of divorce. Since the respondent herself is alleging the marriage has irretrievably broken down, that should no longer be an issue;

(2) Maintenance for either spouse, by the other under ss 77 and 78 of the Act. Section 78 says that the court shall have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage.

Obviously this means that if the spouse claiming maintenance is the 'guilty' party, the party's claim to maintenance may be affected to the degree of that spouse's culpability. On the other hand, it does not mean that an 'innocent' spouse gets much more than the ordinary measure, as if to punish the other spouse, for there is no punitive element in the grant of maintenance.

[31] The respondent is already receiving generous maintenance and the petitioner had left the matrimonial home, as there was no longer any communication between the parties. This means that the wife may not get maintenance (or less maintenance) if she is the guilty party. It does not mean

that she will receive sums beyond her 'needs' if she is the innocent party — the main test being the 'means and needs' of the parties as envisaged in s 78 of the Act. The respondent's needs in this case are well taken care of. She continues to live comfortably in the matrimonial home. The only child of the marriage is almost 13 years of age. There is no reason why she cannot go out to work. (See *Rose v Rose* [1950] 2 All ER 311 cited with approval in *Thevathasan v Thevathasan* [1950] MLJ 255). As the respondent does not have a 'family' in the strict sense to look after (since there is no husband) and only a 13 year old girl (who presumably like all other children her age spends most of her time in school and at extra-curricular activities), the respondent can be expected to improve herself and her employment prospects, and to be gainfully employed.

[32] In any event, the fault of the parties is relevant in a wife's claim for maintenance only in that the court shall have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage. (Section 77 of the Act).

[33] The Petitioner is paying a monthly sum of RM3,200 as maintenance for the respondent and the child. By Malaysian standards, this is not a small sum and should be sufficient for mother and child to live very comfortably — even if the respondent does not go out to work, as she can be expected to do. It must be remembered that the respondent continues to occupy the matrimonial home to the exclusion of the petitioner, and is free to continue to do so. The petitioner has therefore not refused or neglected reasonably to provide for his child, as envisaged in s 93(1)(a) of the Act.

[34] Section 76 of the Act introduces a regime of matrimonial assets and principles for division. The power of the court to order division is two fold — to divide assets acquired jointly (s 76(1)) and assets acquired by the effort of one party (s 76(3)). In our case, only in the case of the matrimonial home can the respondent's claim be taken seriously, as she claims to have made a direct contribution by also drawing from her EPF balance, just as the petitioner did. That the petitioner has paid the mortgage instalments for all these years is also a material factor. The marriage has lasted only for 13 1/2 years, of which the parties have lived apart for more than half the time. They had been living in separate bedrooms since early 1997 and apart since 30 June 1997 (ie for seven years).

[35] The respondent could not have contributed to the petitioner's acquisition of assets after their separation. Indeed, she worked for the petitioner (as a paid employee) only between February 1993 and February 1996, a period of only three years. In summary:

(1) The petitioner set up his business in February 1989;

(2) The parties only married nearly two years later, in December 1990;

(3) The respondent worked for the petitioner as a paid employee between February 1993 and August 1996;

(4) Since August 1996 the respondent has not been working (with the petitioner or elsewhere).

[36] I am of the opinion that the half share of the respondent in the three properties given to her by the petitioner are still within the basket of 'matrimonial assets and have to be taken into account in dividing the total assets. (See *Yeo Gim Tong Michael v Tianzon* [1996] 2 SLR 1). It therefore can be seen that the respondent has benefited greatly from the petitioner's hard work over the 13 1/2 years of marriage, and the money he brought into the marriage, as not only has he given her a half share in the three properties, but has also continued to meet the loan repayments for the same, thereby enhancing their net worth, even during the past seven years of separation of the parties. In *Shirley Kho v Kenneth Mok Kong Chua* [1989] 2 MLJ 264, the facts were fairly similar to our case. The parties were married for about nine years before the separation. Just before the marriage the husband had bought a property in joint names with the wife-petitioner, as their intended matrimonial home. The purchase price was paid by the respondent from his own funds and a mortgage loan. The petitioner paid for the kitchen cabinets, as well as the servant's salary and food and grocery bill, while the respondent paid the other bills and the mortgage loan repayments. The property was sold and another property ('the Alnwick property') was purchased in joint names with the proceeds of sale of the first property being used towards the acquisition of the second. A month before the first of three children was born, the wife stopped working and the husband prospered on his own, and acquired an apartment, cash balances in the bank, and membership of a country club. The court took all relevant circumstances into account and did 'rough justice' by ordering the husband to transfer his half share of the Alnwick property to the wife, with the wife foregoing her claim to all the other assets. The court felt that this way, the petitioner and the children would have a permanent roof over their heads and afford them some security. In the circumstances, it is my opinion that the respondent in our case is more than adequately compensated for her contributions during the marriage by having a half share in not one but three properties, including the matrimonial home. The other assets of the petitioner were acquired by his own hard work, and most of the loan repayments have been made long after the parties separated by the petitioner alone.

[37] The Originating Summons S4–24–1049 of 1998 was for interim custody and maintenance; and an order had already been made. Any final order made in these proceedings would supersede the order in those proceedings.

[38] The Originating Summons No S4–2336 of 1999 was filed by the respondent for a declaration as to her interest in certain assets. I think that a final order for ancillary relief in these proceedings would dispose of the respondent's claim in those proceedings as well. She was a paid employee of

the petitioner for a period of 13 1/2 years. Her 'contributions' before that were negligible and certainly does not entitle her to any declaration that the assets then acquired by the petitioner are trust properties. Indeed, in any event she has been more than adequately compensated by the fact that the petitioner purchased the intended matrimonial home in joint names. His contribution to the acquisition of that property was far more substantial, and the respondent has benefited from the generosity of the petitioner not only in respect of that property, but also the other two properties in joint names. Indeed, in *Chia Kum Fatt Rolfston v Lim Lay Choo* [1993] 3 SLR 833, the court had held that where there is cohabitation and no express declaration of trust and no express agreement, there is no presumption that the maxim 'equality is equity' applies. The court went on to hold that the parties' shares in the net equity of the property should in principle, be in proportion to the respective financial contributions made by them, without taking into account their non-monetary contributions. Indeed, in our case the wife uses his Mercedes Sports car. In his evidence he had even suggested that she swap it with him for his Proton Perdana. This is indeed a gracious offer, as the Proton Perdana will need less maintenance.

[39] The respondent contends that the petitioner had not made full disclosure. Yet the evidence shows that the petitioner was quite candid in his evidence, as he even disclosed funds he had transferred to his cousin and a friend to hold on trust for his daughter, should something happen to him. Such honesty should be appreciated. The respondent on the other hand, had admitted to being dishonest with her employer, Kajima Corporation in respect of her medical leave. She had also been dishonest with the Inland Revenue, in not declaring her 'side-income'. It is also submitted that she had also made a trip to Israel, without the knowledge and consent of our government, when it is common knowledge that travel to that country is prohibited to Malaysians. She is therefore not in a position to judge the petitioner who has candidly disclosed funds which she could not otherwise have traced.

[40] Whether on the facts of this case the court may refuse to grant a decree of divorce, in the light of s 54(2) of the Act. The current divorce law in Malaysia requires the petitioner to clear two hurdles before the divorce can be given:

(1) Has the marriage lasted two years?

(2) Has the marriage broken down irretrievably?

[41] This is shown by proving one of the four sets of circumstances under s 54(1). In addition, the petitioner must have ordinarily resident here for the last two years or be domiciled here. The court wants dead marriages to be ended gracefully. But the law insists that the marriage must be dead. If the marriage has not died — for instance if it has just temporarily broken down, then divorce is not allowed. In the United Kingdom the Matrimonial Causes Act 1973 allows the blameless spouse to be divorced against his or her will based on the husband and wife have been separated (living apart) for at least

five years. Subject to only to the 'hardship' exception, there is virtually no way that the petitioner can be prevented from obtaining a divorce. 'Sinners' as well as the 'sinned-against' can now petition for divorce, although they will have to wait a sizeable period to do so. Counsel for the respondent suggested that under s 54(2), the court should consider all the circumstances including the conduct of parties and how the interests of the child may be affected on dissolution. Counsel further advocated that it would appear that the question of religion and being social outcasts as divorcees could come under these consideration. This section provides that in considering whether it would be just and reasonable to make a decree that the court shall consider all the circumstances. The court may grant a decree nisi subject to certain terms and conditions. But if it should appear to the court that in all the circumstances it would be wrong to dissolve the marriage, it shall dismiss the petition. First of all, the basic principle is that while there is a need to respect the sanctity of marriage, it is contrary to public policy to insist on the maintenance of a marriage which has in fact ceased to exist.

[42] In *Kathi-Rasen v Kathi-Rasen* [1960] MLJ 57, where the marriage bond has become no more than a detested shackle, it is in the public interest that the tie should be severed.

[43] In *Moses v Moses* [1968] 1 MLJ 96, the court have granted divorces under the Act even to Catholic parties, who by their religion may claim that their religion does not allow them to consent to a divorce.

[44] In *Joseph Jeganaman v Rosaline Joseph* [1989] 3 MLJ 106, where a Catholic priest had tried to save the marriage but failed, and then suggested that the parties find 'other means' to solve their marriage problems. The court is under a duty to consider all the circumstances leading to the breakdown of the marriage. Section 53(2) of the Act states that if the respondent denies that the marriage has broken down irretrievably, the court has to scrutinise the evidence to satisfy itself whether the marriage has or has not broken down. The court has to examine the whole of the evidence and the assertions of the parties.

[45] In *Hariram Jayaram v Saraswathy Rajahram* [1990] 1 MLJ 114, stated that upon proof of the fact that the parties have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition, the petitioner has *prima facie* proved that the marriage has irretrievably broken down, if, but only if, the respondent is not contesting it (ie the fact of the breakdown of the marriage). See *Tan Keok Yin v Chea Saw Hong* [1991] 2 MLJ 266.

[46] In our case, the respondent herself states in para 8(a) of her amended answer (p 90 of the Ikatan Pliding, Bundle A) that the marriage has irretrievably broken down. In para 8(b) on the same page, she admits that the parties have lived apart for at least two years, immediately preceding the presentation of the petition. She gives details of the alleged unreasonable behaviour of the petitioner in para 9. In para 8(c) she says that she cannot consent to a decree being granted

because of her religious faith and will leave it to the court to decide. This is therefore not a case of the wife saying the marriage has not irretrievably broken down, or indeed that there is a chance of reconciliation. This is a case of a wife saying that the marriage has in fact broken down, but that the husband is the cause. That there is indeed separation of more than two years, and that the only reason she is not consenting to the grant of a decree is 'because of her religious faith'. Indeed, she 'leaves it to the court to decide'. These are not the protestations of a wife who wants to save her marriage. Indeed, a decree by a secular court does not bind the wife's conscience. (See *Parghi v Parghi* [1973] 117 Sol Jo 582). There is therefore no reason for this court not to grant the dissolution of the marriage on the petition of the husband, since the wife herself concedes that the marriage has irretrievably broken down. That fact is not disputed, and the wife's 'religious belief is not a ground to refuse to grant the decree. It has not been pleaded, and no evidence has been led, on behalf of the wife, as to why it is not just and reasonable to grant the decree. No suggestion has been made as to how the interest of the child may be affected or why it would be wrong to dissolve the marriage. In the circumstances I am of the opinion that the order of decree nisi ought to be granted.

[47] For these reasons I make the following orders:

In respect of the Divorce Petition S8(S4)–33–562 of 2001 (filed by the petitioner)

(1) The said marriage is hereby dissolved. Decree nisi is made absolute today.

(2) Legal custody of Grace Chee Kuen Yi (f) to petitioner and respondent jointly. Care and control (actual custody) of Grace Chee Kuen Yi (f) to respondent with access to petitioner on alternative weekend at 3pm on Saturday to 3pm on Sunday. School holidays 1/2 : 1/2. First half to respondent. Birthdays and Chinese New Year alternate year. This year to respondent. Petitioner is to maintain Grace Chee Kuen Yi (f) in the monthly sum of RM1,200 plus paying actual expenses for normal education, medical and dental to be paid forthwith on production official receipts by the respondent.

(3) No order.

(4) Each party is to bear his/her own costs.

In respect of the Originating Summons No S1–24–1049- 1998 (filed by the respondent)

(a) See Divorce Petition No S8(S4)–33–562 of 2001;

(b) See Divorce Petition No S8(S4)–33–562 of 2001;

(c) Prayer for wife's maintenance is dismissed. Prayer for child's maintenance see Divorce Petition No S8(S4)–33–562 of 2002;

(d) Prayer for arrears of maintenance is dismissed;

(e) Medical and dental expenses for child see Divorce Petition No S8(S4)–33–562 of 2001.

Medical and dental expenses for respondent is dismissed;

(f) Educational expenses for child see Divorce Petition No S8(S4)–33–562 of 2001;

(g) Repairs for house and cars are dismissed;

(h) Any other relief no order.

In respect of Originating Summons No S4–24–2336 of 1999 (filed by the respondent)

In respect of this Originating Summons for declaration on her entitlement to matrimonial assets, I am approaching it broadly, not on the basis of asset by asset in order to do justice to the parties. Therefore in this case I would group all the defendant husband's assets, landed properties as well as shares in Alpha Enterprise and Triangle Hi-Tech (Malaysia) Sdn Bhd and money still available in fixed deposits in all the banks plus cash to which I am of the opinion the plaintiff-wife is entitled and apply a 'broad brush approach'. Therefore after careful considerations of the fact and evidence in this case I make the following global settlement between the parties, ie:

(1) The defendant–husband shall transfer his half share in:

(a) House No 102, Jalan SS 25/4, Taman Bukit Emas, 47301 Petaling Jaya;

(b) Double storey bungalow house Lot No B66, Zone 7, Bukit Beruntung with encumbrances to his plaintiff–wife absolutely.

(2) In respect of all the fixed deposits in all the Citibank the defendant–husband shall give the plaintiff–wife a sum of RM50,000 in full settlement of all sums still available in those fixed deposits.

(3) The plaintiff–wife shall transfer her 15% shares in Triangle Hi Tech (Malaysia) Sdn Bhd to the defendant–husband absolutely and thereafter she shall have no further claim on them.

(4) The defendant–husband shall transfer the car Mercedes Benz Vehicle Registration No WDY 4444 to the plaintiff–wife absolutely.

[48] In view of the fact that it is by agreement of parties that the Divorce Petition No S4–33–562 of 2001 is consolidated with the Originating Summons No S4(S1)–24–1049 1998 and Originating Summons No S4–24–2336 1999 and heard together simultaneously and in view of the global settlement abovementioned, it is hereby to be understood that the transfer by the defendant–

husband of his shares in the above-mentioned assets absolutely to the plaintiff–wife shall serve as full and final settlement of all her claim in Originating Summons No S4–24–2336 of 1999.

Order accordingly.

Reported by Peter Ling